

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Administrative Law Judge should be modified to reflect the computation of the award to comply with K.S.A. 44-510e. The findings of the Judge pertaining to accidental injury, notice, and nature and extent of disability are affirmed and adopted by the Appeals Board.

(1) Claimant testified that while working for the respondent she felt a pop in her back on July 30, 1993 when parts suddenly shifted in the box she was carrying. The incident occurred shortly before the end of the work day. Although shortly after it happened she told a coworker from whom she obtained a ride about the incident, she did not report the accident or injury to the respondent until August 16, 1993, approximately 17 days later. When asked why she waited to report the incident to the respondent, claimant testified as follows:

"Q. So why did you wait the thirteen days -- or if it turns out to be thirteen, why did you wait the period of time from July 30th to whatever date it was that you reported it to Mr. Bannister?"

"A. Because I felt that I just popped it and I could go to the chiropractor and he could pop it back and things would be fine."

Further, claimant testified respondent had never advised her that there was a requirement to report work-related accidents within ten days of their occurrence. When asked if she knew that respondent had a policy to immediately report work-related accidents claimant stated:

"Q. Okay. Ma'am, you know from working out at Boeing that they have a policy to report work-related accidents immediately, is that correct?"

"A. A lot of people do not do that."

"Q. Well, I understand, but that wasn't my question. You know that that is the policy out at Boeing, correct?"

"A. No."

"Q. You don't know that?"

"A. Well, I guess not or I would have reported it."

On the day of the alleged accident, claimant sought treatment from Dr. Mark Dopps, a Wichita chiropractor. Because Dr. Dopps did not resolve her symptoms, claimant sought additional chiropractic treatment from Dr. Jon Miller. When claimant finally reported the incident to the respondent, the company referred the claimant to a physician for treatment.

Although she has seen chiropractors for approximately 12 years and received back adjustments for treatment of migraine headaches, claimant testified she had never experienced back problems or back pain similar to that she experienced as a result of the July 1993 incident. However, several years ago Dr. Miller provided claimant with a device to wear while moving items and in 1979 claimant had low back pain associated with kidney stones. She recalls no occasion during her 14 years with respondent when she missed work or had medical restrictions because of her low back.

Since her accident claimant has returned to work for the respondent and now earns the same or a higher wage than what she was earning in July 1993.

Only one physician, Daniel D. Zimmerman, M.D., testified regarding claimant's functional impairment rating. He examined claimant at her attorney's request in

January 1994. After his examination and reviewing the results of MRI studies, he diagnosed aggravation of degenerative desiccation of the nucleus pulposus at the L3-L4, L4-L5 and L5-S1 intervertebral levels with symptoms consistent with paraspinous myofascitis and intermittent right lower extremity pain and discomfort. He believes claimant has a 7 percent whole body functional impairment and that she should be restricted to occasional lifting up to 50 pounds and frequent lifting up to 25 pounds. Also, claimant should avoid frequent bending, stooping, squatting and crawling. Although claimant had a pre-existing degenerative condition in her lumbar spine, because her low back was asymptomatic before July 1993, the doctor would not have placed work restrictions upon her. In addition, he would not have known a prior condition even existed if it were not for the July 1993 injury which prompted the MRI. When asked what portion of his functional impairment rating was attributable to her pre-existing condition, the doctor stated:

"Q. Your 7 percent impairment of function rating, what percentage would you attribute to the degenerative desiccation which we know pre-existed the July 30, 1993, incident?"

"A. Well, I wouldn't probably assess any of it to it because prior to July 30th of 1993 she was asymptomatic."

"Q. Doctor, where did you get the history that she was asymptomatic prior to July 30, 1993?"

"A. I had no history from her indicating that she had had previous back problems, and I had no real awareness from anything I reviewed or from her as she stated it that she had pre-existing back problems."

The Appeals Board finds that claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent on July 30, 1993. The injury is consistent with the description of the accident and immediately reported to a coworker.

(2) The Appeals Board finds that claimant failed to provide respondent notice of either the accident or injury within ten days of its occurrence. However, the Appeals Board finds that claimant has established just cause to excuse that failure and extends the notice period to 75 days from the date of accident as provided by K.S.A. 44-520. Claimant was justified in believing her back condition would improve with chiropractic treatment and promptly reported the incident when the symptoms did not resolve as anticipated. Additionally, the evidence is uncontroverted that claimant was never advised by the respondent that she was required to report accidents within ten days of their occurrence and likewise unaware there was a company policy to immediately report work-related incidents.

(3) The Appeals Board finds that claimant has sustained a 7 percent whole body functional impairment as the result of her July 1993 work-related accident and is entitled to receive permanent partial disability benefits based upon that rating. Because claimant has returned to work for respondent at a wage which is equal to or greater than 90 percent of the average gross weekly wage that she was earning on the date of the accident, under K.S.A. 44-510e claimant is entitled to benefits based upon her functional impairment rating.

Although claimant testified at the preliminary hearing that she had had chiropractic back adjustments for several years before the July 1993 accident, at the regular hearing she clarified that testimony and indicated her earlier chiropractic treatment and back adjustments were administered to relieve her migraine headaches. No other evidence was presented to controvert that testimony. Based upon that evidence and the testimony of Dr. Zimmerman, the Appeals Board finds that claimant was not functionally impaired before her July 1993 accident and, therefore, her award of compensation should not be reduced under the provisions of K.S.A. 44-501(c) for pre-existing functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated February 20, 1995 should be, and hereby is, modified.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Lois A. Ryan, and against the respondent, The Boeing Company - Wichita, and its insurance carrier, Aetna Casualty & Surety, and the Workers Compensation Fund, for an accidental injury which occurred July 30, 1993 and based upon an average weekly wage of \$673.18, for 29.05 weeks of permanent partial disability benefits at \$313.00 per week or \$9,092.65 for a 7% permanent partial general disability making a total award of \$9,092.65.

As of March 22, 1996, there would be due and owing to the claimant 29.05 weeks of permanent partial disability compensation at the rate of \$313.00 per week in the sum of \$9,092.65 which is ordered paid in one lump sum less any amounts previously paid.

Pursuant to the stipulation of the parties, the Workers Compensation Fund is responsible for one-half of the costs and benefits associated with this claim.

The remaining orders set forth in the Award are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Eric K. Kuhn, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director